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PROTECTING CONSUMERS SINCE 1975

October 8, 2020

Delivered via Email (supctfilings@sccourts.org) and U.S. Mail

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

RE: Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates
South Carolina Public Service Commission Docket No. 2019-290-WS
Appellate Case No. 2020-001283

Dear Mr. Shearouse:

Attached for filing is the Return to Petition for Writ of Supersedeas on behalf of the South Carolina Department of Consumer Affairs. The Certificate of Service is attached to the Return. An original of this filing will be delivered via U.S Mail to your office. Please advise if anything else is required for filing.

Regards,

Roger Hall, Esq.
Assistant Consumer Advocate
SC Department of Consumer Affairs
rhall@scconsumer.gov

Enclosures

cc w/enc: Parties of Record (via email)
S.C. Public Service Commission (via electronic filing)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company
for Approval to Adjust Rate Schedules and Increase Rates.....Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Pursuant to SCACR 240(e), the South Carolina Department of Consumer Affairs (the "Department") respectfully submits this return to the petition for writ of supersedeas made by Blue Granite Water Company (the "Company"). The petition should be denied for the following reasons. The Company admitted it failed to file the required application for supersedeas with the Public Service Commission (the "Commission"). Additionally, the rates the Company proposes to implement have not been approved by the Commission. Retroactive ratemaking does not apply here and, if it did, exceptions to the general prohibition exist. Further, the Commission has already granted relief requested by the Company to address potential foregone revenues and mootness is not a concern as the Court will be able to provide additional relief in the event the Company prevails on appeal.

SC Order No. 2003-02-25-01 states:

> Supersedeas is usually granted only when necessary to avoid irreparable injury or a miscarriage of justice and only in cases where it is likely that the appellant will succeed on the merits of the case. 4 C.J.S. Appeal and Error § 417 (1993). In order to obtain an injunction, the moving party must show that the conduct sought to be

> enjoined threatens the moving party with irreparable injury for which there is no adequate remedy at law. Thornton v. Arnold, 274 S.C. 1, 260 S.E.2d 179 (1979).

As discussed below, none of these conditions are applicable in this case. The Commission has acted within its authority to provide a just rate for the Company's customers and adequate protection for the Company. Supersedeas would only serve to shift the financial burden to the customers; therefore, the petition should be denied.

I. PETITION SHOULD BE DENIED ON PROCEDURAL GROUNDS

The Company's Petition for Writ of Supersedeas ("Supersedeas Petition") should be denied for failure to file an application for supersedeas with the Commission as required by SCACR 241(d)(1). The "Procedure for Obtaining Lift of Stay or Supersedeas" states "[e]xcept where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal." SCACR 241(d)(1). The Company admits its filings with the Commission "did not frame its requested relief as one of 'supersedeas'…"[1]

On August 7, 2020 the Department sought clarification from the Commission regarding bond issues and the ability of the Company to implement rates under bond beginning September 1, 2020. August 18, 2020, the Commission issued Order 2020-549 scheduling oral arguments on the issues. That Order also stayed the implementation of rates under bond until further notice.[2] As discussed further below, these actions were completely within the statutory authority of the Commission.

On August 24th, the Company submitted a Conditional Petition for Approval of an Accounting Order ("Accounting Order Petition"). The petition is attached hereto as Exhibit A.

[1] Supersedeas Petition, page 13.
[2] Exhibit E to Company's Supersedeas Petition.

Oral arguments were held August 27th and on August 31st, the Commission issued its Directive staying implementation of rates under bond and also granting the Company's request for an accounting order.[3] While the Company did file a petition for reconsideration of the Commission's stay and the PSC denied the request, the Commission's September 16, 2020 Directive indicates the Commission will "provide a detailed Order setting forth its rationale and basis for denying the Motion to Reconsider Order No. 2020-549."[4]

SCACR 241(d)(7) provides- "Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision." Until the Commission issues its order "setting forth its rationale and basis", there is little for this Court to review. There has also been no "unnecessary delay" as contemplated by SCACR 241(d)(1). The issues raised regarding the bond and the Department's request for clarification are complicated and therefore, the absence of an order (as of the date of this filing) is not an "unnecessary delay".

II. GRANTING THE PETITION WOULD ALLOW THE COMPANY TO IMPLEMENT RATES NOT APPROVED BY THE COMMISSION

On September 23, 2020, the Commission issued Order 2020-641 on separate Petitions for Clarification and Rehearing/Reconsideration filed by the Company and the Office of Regulatory Staff on April 29, 2020.[5] Order 2020-641 addresses only those petitions and does not address the bond issue. Notably, the order states "[t]he Company shall update and refile the schedule of rates, terms and conditions to reflect values adjusted or clarified in this Order with this Commission as soon as practicable."[6] Upon information and belief, the Company has not updated and refiled the

[3] Exhibit F to Company's Supersedeas Petition.
[4] Exhibit H to Company's Supersedeas Petition.
[5] Exhibit I to Company's Supersedeas Petition.
[6] Exhibit I to Company's Supersedeas Petition. Page 14, paragraph 17

schedule of rates, terms and conditions.[7] This is notable because, at this time, the only rates that have been approved by the Commission are those found in Order 2020-306[8] which was issued after the initial hearing on the Company's application to increase rates.[9]

Any rate implementation must be approved by the Commission per S.C. Code Ann. Regs.103-703.[10] Therefore, the Company is now requesting the Court to authorize it to implement bond rates that have not yet been approved by the Commission. By granting Supersedeas, the Court would in effect set the Company's rates in contradiction of the principle that Commissions, and not courts, are to determine rates. S.C. Code Ann. § 58-3-140(A). *See also* Patton v. South Carolina Public Service Com., 280 S.C. 288 (1984).

III. JUDICIAL REVERSAL DOES NOT LEAD TO RETROACTIVE RATEMAKING

The Company claims it "is precluded from retroactively correcting rates to recover lost revenues" and "is precluded from being made whole by the long-standing prohibition on retroactive ratemaking."[11] This is simply not accurate as exhibited by the precedent set by this Court, the Commission, and others, in identifying exceptions to the otherwise apparent rigidity of the prohibition. The Commission and this Court have recognized the ability of a utility to employ deferral accounting, which, on its face, would violate the prohibition on retroactive ratemaking.

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[7] The Company submitted proposed rates on June 8 that were based on the Commission's May 28 Directive issued after the Company and ORS submitted Petitions for Clarification and Rehearing; however, the rates were proposed before the Commission's formal Order 2020-641 (issued September 23, 2020) and have not been approved by the Commission.

[8] Exhibit B to Company's Supersedeas Petition.

[9] In the Supersedeas Petition, page 3, the Company indicates it "implemented the rates authorized by the Commission on reconsideration."

[10] **R.103-703** Authorization for Rates and Charges. A. No schedule of rates, contracts, or rules and regulations, shall be changed until after the proposed change has been approved by the commission. B. All rates, contract forms, or rules and regulations, proposed to be put into effect by any utility as defined in 103-702(14), shall be first approved by this commission before they shall become effective, unless they are exempt from such approval by statute or other provision of law. C. No rate, contract, or rules and regulations of any utility under the jurisdiction of this commission shall be deemed approved or consented to by the mere filing of a schedule, or other evidence thereof, in the offices of the commission.

[11] Supersedeas Petition, pages 1-2 and 6.

See Hamm v. South Carolina Public Service Com., 294 S.C. 320 (1988). In fact, the Company's Accounting Order Petition, discussed further below, requests permission to defer the foregone revenues for recovery in the next rate case.

This Court has acknowledged "[r]ate-making is a prospective rather than a retroactive process" while at the same time noting an exception exists for "amortizing an extraordinary expense." Porter v. SC PSC 328 SC 222, 231 (1997). In reaching that conclusion the Court looked to prior case law in Pennsylvania. *See* Popowsky v. Pennsylvania PUC, 695 A.2d 448 (1995).

Looking at other state decisions within the context of the current matter, it is also clear several other applicable exceptions or exclusions have been identified.[12] The applicable exceptions involve cases where either a Commission decision was overruled by judicial review or where ratepayers were on notice of potential rate changes due to an appeal.

In a case involving refunds to customers, the North Carolina Supreme Court concluded its ordering of refunds did not constitute retroactive ratemaking. The court noted a "rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been 'lawfully established' until the appellate courts have made a final ruling on the matter." State ex rel. Utilities Com. v. Conservation Council of North Carolina, 312 N.C. 59, 67 (1984); *see also* PUC of California v. FERC, 988 F.2d 154, 161 (1993) ("This case involves three important factors, however, which in combination lead us to conclude that FERC's order permitting the passthrough charges does not violate the rule against retroactive ratemaking. First, and most important, Transwestern's decision to adopt the GIC, along with its exclusivity condition, was

[12] Some courts have held circumstances create an "exception" to the rule against retroactive ratemaking, while others note the same actions are simply not retroactive ratemaking. For further discussion, see Scott Hempling, Regulating Public Utility Performance (2013) (Chapter 10, Retroactive Ratemaking. 10.c Seven Exceptions. "Some commission orders have retroactive effect in a chronological sense, but are not retroactive ratemaking in a legal sense.")

based on a FERC order that we later determined was unlawful. Second, Transwestern's immediate challenge to the exclusivity condition, as well as the pipelines' judicial challenge to the sunset date, put SoCal and CPUC on notice that the conditions of Transwestern's GIC might be subject to change.")

This Court and other state courts reached logical conclusions in that to order otherwise would prevent the appellate body from using its authority to correct errors. "The function of the courts in reviewing Commission proceedings would be meaningless if no remedy could be provided after the court holds that a Commission-approved rate order included allowance of improper expenses and deductions for the utility." Independent Voters v. Illinois Commerce Com., 510 N.E.2d 850, 858 (1987). *See also* Western Resources v. FERC, 72 F.3d 147, 151 (1995) (noting that if Commissions are not able to take remedial action to correct its own errors, utilities could be harmed by the errors.)

Courts have also found regulatory notice is sufficient to overcome the general prohibition against retroactive ratemaking. In deciding Western Resources, a case involving a pipeline company, the United States Court of Appeals for the District of Columbia Circuit noted "the presence of the court challenge may adequately notify customers, for purposes of the filed rate doctrine and the rule against retroactive ratemaking, both of the possible invalidity of the pipeline's initial approach and of the likelihood of an alternative tariff to recover the costs in question." Western Resources, 72 F.3d at 151.

It is important to make the distinction that if the Company prevails on its appeal, the Commission will not be setting rates retroactively, but they will be setting rates due to the statutory review by this court. *See* Gearhart v. PUC, 356 Ore. 216, 243 (2014) ("when a PUC order issued in the exercise of its ratemaking authority has been reversed and remanded after a reviewing court

determines that there was a legal error, the PUC can again use ratemaking principles on remand to determine the effect of its error on the outcome of the proceeding. Although the rule against retroactive ratemaking may prevent certain actions on remand, it does not prevent the PUC from reexamining prior rates to determine what rates it would have set in the absence of its legal error. Because the PUC in this case reexamined past rates following judicial review and reversal of prior rate orders, we conclude that that reexamination was permissible and did not violate the rule against retroactive ratemaking.") *See also* Independent Voters v. Illinois Commerce Com., 510 N.E.2d 850, 857 (1987) ("This rule against retroactive rate-making, the Commission urges, prevents refunds after a rate order is reversed by a reviewing court. We disagree.… The refund here is a result of a direct, statutorily authorized, review of the Commission order. This case was remanded to the Commission previously to correct the erroneous portion of the rates, not for original rate-making.")

Here, if the Court determines the Company was entitled to charge higher rates beginning September 1, 2020 and thus had indeed foregone additional revenues due to an erroneous decision by the Commission, the case would be remanded to the Commission to determine new rates by including the foregone revenue. Those rates would be charged prospectively, based upon judicial review, and after notice to consumers; therefore, the implementation of new rates would not violate the rule against retroactive ratemaking.

IV. ACCOUNTING ORDERS AND ADEQUATE RELIEF

The Company is not at risk of suffering an irreparable injury. As noted above, if the Company prevails on appeal, the Commission must set new rates to account for any foregone revenues. While the Company contends retroactive ratemaking will preclude it from being made whole, it previously requested, and the Commission granted, an accounting order allowing it to

defer the difference between rates it could charge after the order on reconsideration and those it proposed to implement under bond. The Company's Accounting Order Petition states it would constitute a taking to disallow the implementation of rates under bond; however, it further states:

> There are two possible remedies to avoid an unconstitutional taking. The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. **An alternative remedy is to grant the instant deferral request**.[13]

In its Supersedeas Petition to this Court, the Company asserts "absent relief, the Company must forego these revenues and suffer from degraded cash liquidity, despite being required to continue its utility operations and investments on an ongoing basis."[14] It also opines the regulatory asset account does not guarantee recovery and to support this position, the Company notes the Commission Directive approving the accounting order states the order "will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding."[15] However, each of these positions directly contradicts those made by the Company in support of its request for an accounting order from the Commission.

In the Accounting Order Petition, the Company states "[a]n accounting order will enable the Company to have continued access to necessary capital during these uncertain and rapidly changing economic times…"[16] The Accounting Order Petition further states the order " will not prejudice the right of any party to address the recovery of these costs in a subsequent rate case proceeding"[17] and "will not preclude the Commission or parties from addressing the recovery of these costs in a future rate case proceeding."[18]

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[13] Accounting Order Petition, page 1. Emphasis added.
[14] Supersedeas Petition, page 2.
[15] Supersedeas Petition, page 6.
[16] Accounting Order Petition, page 6
[17] Accounting Order Petition, page 1.
[18] Accounting Order Petition, page 6-7.

The Commission granted the Company's request and yet the Company now argues the accounting order is inadequate and it must be permitted to implement rates under bond. In effect, the Company is requesting this Court overrule the relief the Company requested because of its new argument that collecting the foregone revenues in the future would be retroactive ratemaking. However, accounting orders are often used to allow recovery of similar costs precisely because they are not considered retroactive ratemaking.

In addressing whether an accounting authority order ("AAO") to capture cost savings due to the retirement of a coal-fired electric power plant pending the utility's next rate case constituted retroactive ratemaking, the Court of Appeals of Missouri, Western District, noted "[a]lthough recovery under the AAO is conditioned on filing a subsequent rate case, this is not a case of retroactive ratemaking. State ex rel. Mo. Gas Energy v. PSC, 210 S.W.3d 330, 335 (2006). The Court further noted "[t]his is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future." *Id.* at 336.

While the Company references foregone revenues and potential takings, this is not money the Company has or is currently owed. If it is allowed to charge rates under bond and subsequently loses on appeal, the Company must pay back its customers plus 12% interest. Therefore, the only way these monies could be considered foregone revenue is if the Company is able to generate a return of greater than 12% between now and the time the appeal is decided. While both the Commission and Company have noted, in a future rate case, parties may address the recovery of the deferred amounts, any challenges must be related to determining the numerical value of the deferral. In other words, parties may challenge whether the Company accurately recorded amounts in the asset, but not the recoverability itself. This is so because if this Court determines the

Company was entitled to additional revenues not previously accounted for by the Commission and remands to the Commission for determination of proper rates, the past revenues would be considered when setting new rates. This is similar to the Company's approved deferral request in that it would permit recovery of the additional revenues in a future rate proceeding; however, under the Company's new request to lift the stay, the customers are required to shoulder the additional financial burden and would do so immediately.

V. THE COMMISSION ACTED WITHIN ITS AUTHORITY

In its Petition for Reconsideration and Supersedeas Petition, the Company argues the Commission has committed an *ultra vires* act by enacting a stay on the implementation of rates under bond. The alleged *ultra vires* act is one basis for the Company's opinion that it is likely to succeed on the merits. However, the decision of the Commission was completely within its statutory authority and supersedeas is not necessary to prevent a miscarriage of justice because implementing rates under bond is not a "matter of right". As noted in the Supersedeas Petition, "there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested…" S.C. Code Ann. § 58-5-240(D).

The Legislature provided the Commission with broad authority to ensure that what is implemented in practice or policy is just and reasonable.[19] The Legislature also provided authority to the Commission to change its prior decisions to ensure fairness. S.C. Code Ann. § 58-5-290 requires the Commission to reject what is unfair and unreasonable, including unfair or

[19] **SECTION 58-5-210.** Supervision and regulation of rates and service. The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every "public utility" as herein defined.

unreasonable rates, rules or practices, "however or whensoever they shall have… been fixed or established" and instead to order what is fair and just.[20]

Further, S.C. Code Ann. § 58-5-300 empowers the Commission to "consider all facts which in its judgment have a bearing upon a proper determination of the question…" even if such facts weren't included in the application. This authority extends to cases in which the Commission has already ruled and issued an order or decision. S.C. Code Ann. § 58-5-320 grants the Commission the ability to "at any time…rescind, alter or amend any order or decision made by it."

This Court has recognized the Commission's ability to act under these circumstances. Citing S.C. Code Ann. § 58-5-290 for the proposition that the Commission must correct unjust or unreasonable rates, the Court stated- "Clearly, under this statute, the Commission has the continuing power to prospectively correct or reduce a previously approved charge." Porter v. SC PSC 328 SC 222, 235 (1997). The opinion further cited S.C. Code Ann. § 58-5-300 and found "the fact that this matter came before the Commission pursuant to Company's request for an increase in the new account charge does not impact the Commission's power to consider all the facts before it and order a reduction in this charge." (emphasis in original)

The COVID-19 pandemic has had an extraordinary financial impact on residents of the state, particularly on renters, the elderly, and service industry employees. As the Department stated during oral arguments at the Commission on August 27, 2020, if ever there were a time for

[20] **SECTION 58-5-290.** Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to be thereafter observed and enforced and shall fix them by order as herein provided.

the Commission to find that increasing utility rates is unfair or unjust and to revise a prior decision, it is now.

The Commission recognized the impacts on March 18, 2020 when it sent letters to the Governor and Legislature asking each to delay or stay all deadlines in S.C. Code Ann. § 58-5-240, including the issuance of the Order in this case. Both letters stated this request was being made "so that ratepayers will be spared the possible economic effects in these troubled times." On August 31, 2020, after the oral arguments, the Commission issued its Directive continuing the stay on bond rate implementation and also granting the accounting order request. That Directive states "Mr. Chairman, I believe that this Motion is the best way to protect the interest of all parties in this case in this era of the COVID-19 pandemic, and I so move."[21]

As authorized by the Legislature through the statutes noted above, the Commission found, after hearing, that the proposed rates were untenable for the Company's customers in light of the current pandemic and the Commission found an alternative solution to protect the interests of all parties. The accounting order, which was proposed by the Company, has been "substituted for the bond". While the Commission may have previously substituted letters of credit or letters of undertaking, that does not prohibit them from now using an accounting order to protect consumers from a rate increase during the current public health and financial crisis.

VI. CONCLUSION

Supersedeas is not necessary in this case because adequate relief has already been provided to the Company and is available in the event it prevails on appeal. The Company has failed to follow the applicable procedures, has not demonstrated an irreparable injury, and has not shown that it is likely to succeed on the merits in its appeal. The Commission acted within its authority

[21] Exhibit F to Company's Supersedeas Petition.

and protected the interests of all parties when it implemented the stay; therefore, the petition should be denied.

Respectfully submitted this 8th day of October 2020,

S.C. DEPARTMENT OF CONSUMER AFFAIRS

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EXHIBIT A

CONDITIONAL PETITION FOR APPROVAL OF ACCOUNTING ORDER, AND REQUEST FOR EXPEDITED CONSIDERATION

Filed by Blue Granite Water Company

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2019-290-WS

IN RE:	)	
	)	**CONDITIONAL PETITION FOR**
Application of Blue Granite Water	)	**APPROVAL OF ACCOUNTING**
Company for Approval to Adjust Rate	)	**ORDER, AND REQUEST FOR**
Schedules and Increase Rates	)	**EXPEDITED CONSIDERATION**
	)	

Blue Granite Water Company (the "Company") pursuant to S.C. Code Ann §§ 58-3-140, 58-5-210 and 58-5-220 and S.C. Code Ann. Regs. 103-825 and other applicable Rules and Regulations of the Public Service Commission of South Carolina (the "Commission"), conditionally petitions the Commission for an accounting order authorizing the Company to defer in a regulatory asset certain costs associated with the delayed implementation of new rates. The costs the Company conditionally seeks to defer are (1) the difference between the rates approved by the Commission through Order No. 2020-306, as amended by the Commission's decision on reconsideration issued on May 28, 2020 ("Rates on Reconsideration"), and the rates it has planned to implement under bond, at a rate of $5,970 per day, (2) the cost of providing additional notice to customers, and (3) carrying costs on these amounts until recovered from customers. The instant petition for an accounting order is conditional because, if the Commission lifts the stay on the Company's rates under bond prior to September 1, 2020, the petition for an accounting order would be rendered moot.

This request for an accounting order does not involve a change to any of the Company's rates at this time or require any change in any Commission rule, regulation, or policy. In addition, the issuance of the requested accounting order will not prejudice the right of any party to address the recovery of these costs in a subsequent rate case proceeding. Accordingly, neither notice to the

public-at-large, nor a hearing is required regarding this petition.

The Company seeks expedited Commission consideration of this petition. The stay on the implementation of rates under bond—if continued beyond September 1, 2020—would prevent the Company from implementing rates that it has a right to implement under South Carolina law and would constitute a taking in violation of constitutional requirements. There are two possible remedies to avoid such a taking. The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. An alternative remedy is to grant the instant deferral request and permit recovery of the foregone amounts, including carrying costs and necessary noticing costs, following the Company's next general rate proceeding. Either remedy must be approved and implemented by September 1, 2020 to avoid an unconstitutional taking.

I. Background

On October 2, 2019, the Company filed its Application for Approval to Adjust Its Rate Schedules and Increase Rates ("Application"). The Commission conducted an evidentiary hearing on the Application from February 26, 2020 through March 2, 2020. On April 9, 2020, in Order No. 2020-306, the Commission ruled on the proposed rate relief. The Order was served on April 9, 2020, and on April 29, 2020, Blue Granite filed a Petition for Rehearing or Reconsideration with the Commission. On May 28, 2020, the Commission issued its decision on reconsideration, authorizing the implementation of an annual revenue requirement in the amount of $29,191,874.

On June 8, 2020, the Company filed a motion for approval of a bond that would secure for customers the difference between the revenue requirement authorized by the Commission and that which the Company intended to implement under bond pursuant to S.C. Code Ann. § 58-5-240(D),

in addition to annual interest. On July 15, 2020, the Commission approved the Company's request for approval of the bond by a 6-0 vote. On August 7, 2020, for the Commission's convenience, the Company filed a proposed order memorializing the Commission's approval of the Company's bond request. Also on August 7, 2020, the Consumer Advocate filed a letter seeking clarification as to whether the Commission intended to issue a final order related to the bond and whether Blue Granite was permitted to implement rates under bond effective September 1, 2020. The Company filed a response to the Consumer Advocate on August 13, 2020, and filed its executed surety bond on August 17, 2020. On August 18, 2020, the Commission issued Order No. 2020-549, which directed the Clerk's office to schedule oral arguments on the issues raised by the Consumer Advocate and stayed the implementation of rates under bond "until further notice."

II. Relevant Legal Authorities

S.C. Code Ann. § 58-5-240(D) authorizes utilities to put rates into effect under bond, if the utility files with the Commission a petition for rehearing, until final disposition of the case. S.C. Code Ann. § 58-5-240(D) requires that the bond "be in a reasonable amount approved by the Commission, with sureties approved by the Commission." The Commission approved the Company's bond amount and surety by unanimous vote at its July 15, 2020 business meeting and the Company has a clear right to implement the rates under bond. However, in response to the Consumer Advocate's letter requesting clarification, the Commission suspended the implementation of the Company's rates under bond.

The Commission has repeatedly found that it is "without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond," and that the statute grants utilities the authority to "impose its proposed rates under bond as a matter of right . . . ." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No.

2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). The U.S. Supreme Court explained the reasoning behind such provisions in the context of the Natural Gas Act:

> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interest of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible.

United Gas Pipeline Co. v. Memphis Light, Gas and Water Division, 358 U.S. 103, 113 (1958) (*United Gas Pipeline*). Likewise, in *Holt v. Yonce, Chairman of the S.C. Public Service Commission*, 370 F.Supp. 374 (D. S.C. 1973) (*Holt*), affirmed by the Supreme Court at 94 S.Ct. 1553 (1974), the Court was faced with a challenge to the statutory allowance of permitting utilities to put rates into effect under bond, in that case involving South Carolina Electric & Gas ("SCE&G"). The Court relied upon *United Gas Pipeline*, finding that, while rate increases may be difficult for certain customers, such increases "make possible expanded utility service to all who need it." 370 F.Supp. 374, 379. The Court in that case rejected the plaintiffs' challenge.

III. Costs the Company Conditionally Seeks to Defer

The costs the Company seeks to defer are (1) the difference between the Company's Rates on Reconsideration and the rates it has planned to implement under bond, at a rate of $5,970 per day, (2) the cost of providing additional notice to customers, and (3) carrying costs on these amounts until recovered from customers.

But for the Commission's stay, the Company would implement rates under bond effective September 1, 2020 as has been planned by the Company and communicated to its customers. By

enjoining the Company from implementing the rate change, the Commission is requiring the Company to forego revenues to which it is statutorily entitled. As the Commission has repeatedly found, S.C. Code Ann. § 58-5-240 grants utilities the right to implement rates under bond during the pendency of the utility's rehearing and appeal. Denying the availability of this statutory right and denying the Company the ability to recover these additional revenues beginning September 1, 2020 would effect an unconstitutional taking. *See King v. S.C. State Highway Dept*., 248 S.C. 64, 68 (1966) ("South Carolina has consistently taken the broadest possible view of what is a 'taking' and has construed the least actual 'damage' to be a taking. In the construction of Article I, Sec. 17 of the Constitution of 1895, no distinction is recognized between 'taking' and 'damaging', and the deprivation of the ordinary beneficial use and enjoyment of one's property is equivalent to the taking of it, and is as much a 'taking' as though the property were actually appropriated."); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

There are two possible remedies to avoid an unconstitutional taking. The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. An alternative remedy is to grant the instant deferral request. Either remedy must be approved and implemented by September 1, 2020 to avoid an unconstitutional taking. With the Commission's stay of the Company's implementation of new rates, the Company would be required to forego additional revenues at a rate of $5,970 per day.

The rates under bond are those for which customers are currently on notice—see the Company's June 8, 2020 filing in this proceeding—and implementing rates other than those for

which customers are on notice would lead to customer confusion. Further, deferring the amounts to which the Company is constitutionally and statutorily permitted—the rates under bond and associated carrying costs, which will accumulate over time—will lead to incremental rate impacts for customers once recovered at a future date. For these reasons, the preferred remedy would be for the Commission to affirm its previous approval of the bond and lift the stay, thereby permitting recovery of the Company's rates under bond.

To the extent additional notices become necessary for the Company's customers as related to the delayed implementation of the Company's new rates, the Company also seeks to defer the costs for such notices. For example, should the Commission grant the Company's deferral request, customers should receive notice that the rates under bond will not be implemented, and that the Rates on Reconsideration will instead be applied. As part of this deferral request, the Company also seeks to defer the carrying costs associated with the deferred amounts at the Company's weighted average cost of capital. Carrying costs on the deferral balance are an actual cost incurred by the utility, which requires cash. Further, the Company's significant accommodations for its customers during the COVID-19 pandemic have been at substantial cost to the Company.

IV. Conclusion

WHEREFORE, the Company conditionally requests that the Commission issue an accounting order authorizing the Company to defer in a regulatory asset (1) the difference between the Company's Rates on Reconsideration and the rates it has planned to implement under bond, at a rate of $5,970 per day, (2) the cost of providing additional notice to customers, and (3) carrying costs on these amounts until recovered from customers. An accounting order will enable the Company to have continued access to necessary capital during these uncertain and rapidly changing economic times, and the granting of an accounting order will not preclude the

Commission or parties from addressing the recovery of these costs in a future rate case proceeding.

Respectfully submitted this 24th day of August, 2020.

s/Samuel J. Wellborn
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Attorneys for Blue Granite Water Company

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2019-290-WS

IN RE:	)	
Application of Blue Granite Water Company for Approval to Adjust Rate Schedules and Increase Rates	)	CERTIFICATE OF SERVICE
	)	

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of the **Conditional Petition for Approval of Accounting Order, and Request for Expedited Consideration** in the referenced matter to the parties listed below by electronic mail:

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Dated at Columbia, South Carolina, this 24th day of August, 2020.

Toni C. Hawkins

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

In Re: Application of Blue Granite Water Company
for Approval to Adjust Rate Schedules and Increase Rates ..... Appellant.

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

CERTIFICATE OF SERVICE

I, Roger Hall, attorney with the South Carolina Department of Consumer Affairs, do hereby certify that I have this day served a copy of the **Return to Petition for Writ of Supersedeas** in the above-referenced matter on the parties listed below by electronic mail as follows:

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October 8, 2020
Columbia, South Carolina